Annual Survey of Massachusetts Law

Volume 1969 Article 5

1-1-1969

Chapter 2: Comparative Negligence

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CHAPTER 2

Comparative Negligence

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§2.1. Introduction. For over 100 years the law of Massachusetts has been that, where the plaintiff's own negligence contributed as an efficient cause of his injury, he is totally barred from recovery even though the defendant was also guilty of negligence which contributed proximately to the result.[1] Chapter 761 of the Acts of 1969 abolishes this rule and establishes in Massachusetts the doctrine of comparative negligence.

Chapter 761, which becomes effective on January 1, 1971, and applies only to causes of action arising on or after that date, amends Chapter 231 of the General Laws by striking out Section 85 and inserting in place thereof the following:

> §85. *Contributory Negligence No Bar to Recovery of Damages; Findings of Fact or Special Verdict; Reduction of Damages by Court.* Contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.
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> In any such action the court, in a nonjury trial, shall make findings of fact or, in a jury trial, the jury shall return a special verdict, which shall state:
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> (1) the amount of the damages which would have been recoverable if there had been no contributory negligence; and
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> (2) the degree of negligence of each party, expressed as a percentage.
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> Upon such findings of fact or the return of such a special verdict by the jury, the court shall reduce the amount of the damages in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made; provided, however, that if said proportion is equal to or greater than the negligence of the person against whom recovery is sought,

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§2.1. [1] Brown v. Kendall, 60 Mass. 292 (1850).

then, in such event, the court shall enter judgment for the defendant.

The basic operation of the Massachusetts comparative negligence statute is not particularly complex. In a jury trial, the jury returns a special verdict stating the amount of the damages which would have been recoverable had there been no contributory negligence, and the degree of negligence of each party expressed as a percentage. In a nonjury trial these findings are made by the judge. If the percentage of negligence attributable to the plaintiff equals or exceeds that percentage attributable to the defendant, the court enters judgment for the defendant.[2] If the plaintiff's percentage of negligence is less than the defendant's percentage, the court reduces the plaintiff's damages in proportion to the amount of negligence attributable to him. The proportionate reduction is based upon the ratio that the plaintiff's negligence bears to the combined negligence of plaintiff and defendant (usually 100 percent) and not the ratio that the plaintiff's negligence bears to the defendant's.[3] Thus, if the plaintiff was found 20 percent negligent and the defendant 80 percent negligent, the plaintiff's recovery would be reduced by 20 percent (20/100) and not by 25 percent (20/80).

A. Principal Features of the Statute

§2.2. Special verdict. The requirement that the jury return a special verdict has two purposes. One is based upon a fear that a jury, if allowed to render a general verdict, may not reduce the plaintiff's damages as instructed. While it is true that a jury today may ignore contributory negligence or compromise its verdict, the overall danger of a sympathetic jury ignoring the instructions of the trial judge

[2] The operation of this part of the statute leads to the apparently illogical result that, if the plaintiff is 45 percent negligent, he recovers 55 percent of his damages; whereas, if he is 50 percent negligent, he recovers nothing. While this limitation has been criticized as "too much shot through with the noxious and stultifying contributory negligence notion" (see 32 A.T.L.J. 741, 768, 1968), it does seem that there ought to be a point where the plaintiff's own negligence so substantially contributes to his injury that recovery should be denied, particularly with respect to damages for intangibles, i.e., pain and suffering.

Similar limitations exist in Arkansas (Ark. Stat. Ann. §27-1730 (1962)); Maine (Me. Rev. Stat. Ann. tit. 14 §156 (Supp. 1965)); and Wisconsin (Wis. Stat. §895-045 (1963). Mississippi on the other hand has a so-called "pure" comparative negligence statute. (Miss. Code Ann. §1454 (1956)).

New Hampshire recently enacted a comparative negligence statute which has a slight variation on this percentage test. N.H. Rev. Stat. Ann. §507:7a (1969). The New Hampshire statute allows the plaintiff a partial recovery "if his negligence was not greater than the causal negligence of the defendant. . . ." Thus, whereas in Massachusetts a finding of 50 percent negligence on the part of the plaintiff would bar recovery, in New Hampshire, a finding of 51 percent negligence on the plaintiff's part would be necessary to bar recovery. The difference is purely academic.

[3] See Cameron v. Union Automobile Ins. Co., 210 Wis. 659, 246 N.W. 420 (1933), rehearing denied, 210 Wis. 668, 247 N.W. 453 (1933).

is greater with the comparative negligence rule than with the contributory negligence rule. One effect of the comparative negligence doctrine is that cases which might otherwise have terminated in a directed verdict for the defendant[1] must be sent to the jury for an apportionment of damages. The special verdict requirement affords some protection to the insurance companies that juries, operating under the comparative negligence rule, will not ignore or greatly minimize the plaintiff's own negligence. Another reason for the special verdict is that without it, the trial judge could not, in many instances, determine whether the damages awarded are inadequate or excessive.

Under G.L., c. 231, §127, the court may, at any time before judgment, set aside the verdict in a civil action and order a new trial. Inadequacy or excessiveness of the damages awarded constitute grounds for a new trial.[2] Before a verdict is set aside on these grounds, the trial judge should attempt to have the excessiveness or inadequacy of the damages corrected by the appropriate use of the remittitur or additur.[3]

The amount of the plaintiff's negligence obviously has no logical bearing on the ascertainment of his damages. The reduction of damages due to plaintiff's contributory negligence is more in the nature of a penalty. Thus, were the jury permitted to reach a general verdict, the court would have no way of knowing whether a small amount of damages reached by the jury was attributable to a finding of contributory negligence to a substantial degree or a misunderstanding of the instructions given on the damages issues. Likewise, a large verdict might actually be excessive, if there were a substantial amount of contributory negligence found, but proper if the jury found little contributory negligence or none at all.

Suppose, for example, in the trial of a personal injury case in which some evidence of contributory negligence has been presented, the jury renders a general verdict of $9000. Considering the nature of the plaintiff's injuries the amount seems inadequate. The plaintiff moves for a new trial. It would be extremely difficult for the court to rule on the motion without knowing the basis for the jury's finding of damages in this amount.[4] The jury might have found that the plaintiff was not

§2.2. [1] While the present G.L., c. 231, §85, creates a presumption of due care on the part of the plaintiff, and while it is seldom that the defendant is entitled to a directed verdict based upon oral testimony of the plaintiff's contributory negligence (Charity v. Yates, 1968 Mass. Adv. Sh. 711, 237 N.E.2d 3), where it is obvious that the plaintiff was not exercising the care of a reasonably prudent man, a directed verdict may properly be ordered for the defendant. Loyle v. Boston Elevated Ry., 260 Mass. 404, 157 N.E. 356 (1927).

It is, of course, theoretically possible for the defendant to receive a directed verdict even under the comparative negligence statute. Thus the court could rule that as a matter of law the plaintiff contributed proximately to his own injury and as a matter of law the plaintiff's negligence was equal to or exceeded the defendant's. While such cases are rare, they may occur. See Pyykonen v. Mutual Service Casualty Ins. Co., 260 F.2d 351, 353 (7th Cir. 1958).

[2] G.L., c 231, §128.

[3] Id. §127.

[4] The court could request orally answers to special questions concerning the jury's

guilty of contributory negligence and that his actual damages were $9000; or it might have found that the plaintiff was 40 percent responsible for his injuries and that his actual damages were $15,000. In the latter set of findings, the damages may not be inadequate and the motion should be denied; whereas in the former set of findings, the motion should perhaps be granted unless the defendant agrees to the addition of such amount as the court finds reasonable. The use of the special verdict obviates this difficulty.

§2.3. Amount of negligence. The language of the Massachusetts comparative negligence statute which is most vulnerable to questions of statutory construction is that which has reference to the diminution of the plaintiff's damages in proportion to the amount of his negligence. Does the word "amount" refer to the extent of the plaintiff's deviation from the standard of reasonableness in terms of the risks which his conduct was creating immediately prior to the accident (moral fault), to the extent to which the plaintiff's negligence contributed to the accident which actually occurred (legal fault or proximate cause), or to a combination of both elements.

Assume a situation where the defendant has failed to check and replace a very bald tire on his automobile. As a result of such failure, he has a blowout while driving on a major highway. He loses control of the automobile, crosses the center strip and strikes the plaintiff's automobile coming in the opposite direction. The plaintiff is highly intoxicated, driving at an excessive speed and weaving from lane to lane. Assume the facts would reasonably create an inference that, had the plaintiff been exercising ordinary care, he could have avoided the harm. Assume, further, that the jury finds that both the plaintiff and the defendant were negligent and the negligence of each contributed proximately to the plaintiff's injuries. In determining the "amount" of the plaintiff's negligence, if the jury focuses its attention solely on which party is more morally blameworthy, in the sense of which conduct was creating the greater risk of harm just prior to the accident, the likelihood is that it will conclude that the plaintiff's negligence was at least equal to, or perhaps even greater than the defendant's. Such a finding under the statute would result in a judgment for the defendant. If the jury, on the other hand, is instructed that in determining the "amount" of the plaintiff's negligence it should consider only the extent to which the plaintiff's conduct contributed to his injury, it might well find that the "amount" of the plaintiff's negligence was less than the defendant's. After all, the plaintiff was struck on his side of a divided highway by the defendant's automobile which went out of control due to the defendant's negli-

finding on contributory negligence and damages provided that it did so before the verdict was recorded. Under Massachusetts law the court may request orally answers to special questions after the jury has returned a general verdict. See G.L., c. 231, §124; Newell v. Rosenberg, 275 Mass. 455, 459, 176 N.E. 616, 618 (1931). The court may not do so after the verdict has been recorded. Patterson v. Barnes, 317 Mass. 721, 724-725, 60 N.E.2d 82, 84-85.

gence. The plaintiff's negligence only operated to prevent the plaintiff from getting out of the way.

It is this writer's view that the correct theoretical answer to the problem posed is that only legal fault should be apportioned by the jury in arriving at damages. This conclusion is borne out by the language of the statute. It states that "[c]ontributory negligence shall not bar recovery . . . if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the *amount of negligence*. . . ." (Emphasis added.) The word "such" appears to incorporate the elements of contributory negligence, and it is unlikely that the word "negligence" as used in subsequent parts of the statute refers to anything different. Under existing law, negligence of the plaintiff, no matter how culpable he may be in the sense of creating risks to others, even to the defendant, will not operate as a bar to recovery unless it created an unreasonable risk of harm to the plaintiff himself.[1] This legal fault concept of contributory negligence appears to have been incorporated by reference into the comparative negligence statute, even to the extent of the jury's determination of the "amount" of the plaintiff's negligence.

Irrespective of this conclusion, it is likewise this writer's view that no instruction should be given to the jury limiting its determination of the "amount" of the plaintiff's negligence to the question of comparative degrees of efficient cause. Two reasons prompt this conclusion, the first of which is simplicity. The perfect conceptual solution to a problem is useless unless it can be fairly understood and applied by a jury. The concept of proximate cause, particularly as it relates to the issue of the existence of contributory negligence, is itself sufficiently complex. To require the jury then to go further and determine degrees of proximate cause, discounting culpability in the moral sense, is unrealistic.

Secondly, the comparative negligence doctrine is merely an attempt to mitigate the harshness of the present rule that contributory negligence is a complete defense. It represents sort of a compromise between our present system and a completely no-fault system of recovery. As such, it is not unfair to a plaintiff if a jury gives some consideration to the moral culpability of his conduct in assessing damages. After all, before the jury ever reaches the question of comparative negligence, it has already determined that both the plaintiff and the defendant acted unreasonably and that the conduct of each contributed proximately to the plaintiff's injury.[2] Beyond that, the jury should simply

§2.3. [1] O'Connor v. Hickey, 268 Mass. 454, 167 N.E. 746 (1929).

[2] It seems reasonably clear that the comparative negligence statute makes no change in the rule that the plaintiff's own negligence has no effect on his recovery unless it operates as an efficient or proximate cause of the injury. Most states which have adopted a comparative negligence doctrine have been faced with the question of the effect, if any, of such doctrine on the "last clear chance" rule. The consensus appears to be that, if the last clear chance doctrine is in actuality only the applica-

be told to determine the degree of negligence of each party expressed as a percentage without any instruction being given as to efficient cause.[3]

§2.4. **Wrongful death.** Under existing law, a person shall be liable if his negligence causes the death of a person "in the exercise of due care."[1] Since the Massachusetts comparative negligence statute applies not only to actions for injury to person or property but also to death actions, this law will be changed on the effective date of the statute.

In other states which have adopted comparative negligence, the application of the doctrine in a death action is quite similar to its application in an injury case. The damages are determined on a compensation theory and are then diminished in proportion to the amount of the decedent's negligence. In Massachusetts, however, damages in

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tion of the proximate cause principle in the area of contributory negligence, comparative negligence should have no effect on the doctrine. If, however, "last clear chance" is merely an attempt to mitigate the harshness of contributory negligence as a complete defense, then the purpose of the last clear chance rule is no longer viable with the adoption of a comparative negligence doctrine. The Supreme Judicial Court of Maine recently took this latter view. Cushman v. Perkins, — Me. —, 245 A.2d 846 (1968). (For a discussion of the Maine comparative negligence statute, see 18 Maine L. Rev. 65 (1966)). Massachusetts has never purported to adopt the doctrine of last clear chance. In those cases which presented classic last clear chance situations, the Supreme Judicial Court examined the problem in terms of whether the plaintiff's negligence was a *cause* of the injury or merely created a *condition* which was acted upon by the defendant causing the plaintiff's injury. See Black v. New York, New Haven & Hartford R.R., 193 Mass. 448, 97 N.E. 797 (1907); Wall v. King, 280 Mass. 577, 182 N.E. 855 (1932). Since these decisions speak in terms of proximate cause, it is unlikely that they will be affected by the comparative negligence statute.

[3] An analogous problem involves minor plaintiffs. A minor's age is relevant on the question of whether or not he deviated from the standard of ordinary care. Brooks v. Glidden, 329 Mass. 704, 110 N.E.2d 495 (1953). Whether it is also relevant in the jury's determination of the amount of the minor's negligence under the comparative negligence statute depends upon the resolution of the matter discussed above. In a case involving a minor plaintiff, Kohler v. Dumke, 13 Wis. 2d 211, 216, 108 N.W.2d 581, 584 (1961), the Supreme Court of Wisconsin took the view that in comparing the negligence of two or more persons under the Wisconsin comparative negligence statute, the jury is to consider both the element of negligence and the element of causation, and no attempt should be made to lay down any formula for determining how much weight is to be accorded the element of negligence and how much to that of causation. A view had been expressed in the dissenting opinion of an earlier Wisconsin case, Hanson v. Binder, 260 Wis. 464, 468, 50 N.W.2d 676, 679 (1952), that "[O]nce it has been found that each [party] has violated his duty and is guilty of causal negligence, the element of age and experience drops out of the case, and then there is only the matter of determining whose act (already found to be a negligent one) contributed most to the result. In other words, the comparison is to be made of the extent to which the act or failure of the respective parties contributed to produce the accident, not of their respective duties as they may be affected by their age, experience, or condition."

§2.4. [1] G.L., c. 229, §2. Presumably the language of this statute will have to be amended to reflect the change which will be brought about by the comparative negligence statute.

a death action are based upon the degree of culpability of the defendant's conduct.[2] Applying the comparative negligence statute in Massachusetts in a death action will presumably require the jury to assess the quality or quantity of the defendant's negligence twice — once to determine what damages would have been recoverable had the decedent not negligently contributed to his own death, and then to provide the degrees of negligence of each party, expressed as a percentage. The application of comparative negligence to actions brought under the Massachusetts death statute is somewhat confusing if not unwieldy. Were it not for the special verdict requirement, the likelihood is that most juries would simply take the $50,000 maximum recovery and split it according to the relative degrees of fault. Even with the special verdict, the likelihood is that juries will assess the defendant's culpability at a higher figure than is presently the case,[3] feeling justified on the basis that this will then be reduced by the extent of the decedent's culpability.

It is this writer's view that a comparative negligence statute cannot logically be applied to a punitive statute. As a matter of fact, the present absolute defense of the decedent's contributory negligence makes no sense when applied to a punitive statute. If the statute is quasi-criminal, the imposition of a punishment should not depend upon whether the decedent negligently contributed to his own death. Likewise, the extent of the punishment should not depend upon comparative degrees of negligence of the defendant and the decedent. This point was made by the Supreme Judicial Court in an opinion dealing with the nonjoinder of defendants in a death action: "Logically, as in the criminal law, each wrongdoer may be made to suffer the maximum penalty, no matter how many are guilty."[4] The fact that with contributory negligence or comparative negligence we are dealing with the conduct of the decedent rather than another defendant should make no difference. The death action is not an action belonging to the decedent or his estate. It is a penalty for his death. It is a cause of action over which the deceased has no control. Thus, for example, a release executed by the decedent prior to his death does not constitute a bar to a subsequent wrongful death action.[5]

Another matter for consideration in the application of the Massachusetts comparative negligence statute in a death action involves the effect of the negligence of one or more of the statutory beneficiaries. Under existing law, damages cannot be denied or reduced because of the contributory negligence of one or more out of a group of beneficiaries.[6] Since the Massachusetts comparative negligence statute in a

[2] Ibid.

[3] Under existing law the jury may assess the maximum amount allowable under the statute even though the defendant's conduct was not wilful and wanton. Toczko v. Armentano, 341 Mass. 474, 170 N.E.2d 703 (1960).

[4] Arnold v. Jacobs, 316 Mass. 81, 84, 54 N.E.2d 922, 923 (1944).

[5] Wall v. Massachusetts Northeastern Street Ry., 229 Mass. 506, 118 N.E. 864 (1918).

[6] O'Connor v. Benson Coal Co., 310 Mass. 145, 16 N.E.2d 636 (1938).

death action has reference only to a diminution of damages ". . . in proportion to the amount of negligence attributable to the person for whose . . . death recovery is made . . . ," the statute should have no effect on this rule. In other words, the comparative negligence statute relates to the negligence of the decedent and not to any negligence of one or more of the statutory beneficiaries.

§2.5. **Joint tort-feasors.** The comparative negligence statute poses several problems of statutory interpretation when applied to joint tort-feasors. Assume, for example, that the plaintiff sues two defendants, D_1 and D_2 jointly, claiming that their separate acts of negligence combined to cause his injuries. The jury finds that P suffered $30,000 damages and that P was 25 percent negligent, D_1 was 25 percent negligent, and D_2 was 50 percent negligent. Should judgment be entered for D_1 on the basis that P's negligence and the negligence of D_1 are equal and, if so, what amount should be deducted from the $30,000? In the language of the statute ". . . if said proportion [the plaintiff's negligence] is equal to or greater than the negligence of the person against whom recovery is sought, then, in such event, the court shall enter judgment for the defendant. . . ." This would seem clearly to indicate that judgment should be entered for D_1. To interpret the word "person" as meaning persons when joint tort-feasors are involved would not appear to be within either the letter or spirit of the statute.

Assuming that judgment is entered for D_1 on the above reasoning, will P recover $20,000 ($30,000 minus $10,000 ($25/75 \times \$30,000$)) or $22,500 ($30,000 minus $7500 ($25/100 \times \$30,000$)). In other words, when judgment is entered for D_1, is P's negligence then compared with the total remaining negligence (75 percent) or is D_2, in effect, required to pick up the negligence of D_1? The answer to this question is not contained explicitly in the statute. The relevant portion of the statute states that "the court shall reduce the amount of damages in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made . . . ." It thus provides us with the numerator but not the denominator of the fraction. It is this writer's view that the plaintiff's damages should be reduced on the basis of the ratio that the plaintiff's negligence bears to the combined negligence of the plaintiff and those defendants against whom liability has been established, 25/75 in our hypothetical. This view, it is submitted, is consistent with the spirit of the comparative negligence statute, which is simply to relieve plaintiffs from the harshness of the doctrine that contributory negligence is a complete defense. It is doubtful that the legislature, by choosing language reducing the damages by the amount of the plaintiff's negligence (as opposed to reaching the the same result by allowing damages to the extent of defendant's negligence), intended to hold D_2 responsible for the negligence of D_1 in the above hypothetical.[1]

§2.5. [1] An opposite result was reached by the Supreme Court of Wisconsin, principally upon the choice of language used by the legislature that the "damages

The results suggested above should in no way be changed where P, rather than suing D_1 and D_2 jointly, sues only D_2 who thereafter impleads D_1 as a third party defendant[2] for the purpose of determining his right, if any, to contribution from D_1. As third party defendant, D_1 should be entitled to establish that his negligence was no greater than P's negligence, and therefore, as to P that he was not a joint tortfeasor liable in contribution to D_2.[3] In this instance, even though D_2 loses any right to contribution from D_1, he nevertheless benefits by having impleaded D_1. By impleading D_1, D_2 forces a fact-finding on the amount of D_1's negligence which, even if less than P's negligence, will benefit D_2 by lessening P's recovery. In other words, by impleading D_1, D_2 requires the fact-finder to make findings on the percentages of negligence of P, D_1, D_2 in the same fashion as if P had originally joined D_1 and D_2. Again assuming percentages of negligence of 25, 25 and 50 percent for P, D_1 and D_2 respectively, it can be seen, by way of illustration, that the effect of D_2's impleader of D_1 is to diminish P's recovery from 75/100 of the total damages to 50/75 of those damages, i.e., from ¾ to ⅔, resulting in a benefit to D_2 of 1/12 of the total recovery.

B. Suggestions in Related Areas

§2.6. Assumption of the risk. One of the most anomalous doctrines of tort law is the defense of assumption of the risk. In essence, it denies recovery to a plaintiff who voluntarily exposes himself to a known and appreciated risk.[1] While the application of the doctrine has in many cases rendered "unnecessary an analysis which might determine whether the ultimate ground of denial of recovery is absence of duty or breach of duty, want of proximate causal relation, or contributory negligence,"[2] it does operate as a defense independently of contributory negligence.[3] Thus, a plaintiff may be denied recovery despite the fact that he acted with due care.[4] The doctrine is not a just one. If the defendant has not breached a duty to the

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allowed shall be diminished by the jury in the proportion to the amount of negligence attributable to the person recovering." See Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 534, 252 N.W. 721, 727 (1934).

2 See G.L., c. 231, §4B.

3 See G.L., c. 231B, §1(a). With exceptions not here applicable, contribution under this statute is dependent upon the establishment of joint liability. Where D_1's negligence is equal to or less than P's, such joint liability does not exist.

§2.6. 1 Pouliot v. Black, 341 Mass. 531, 170 N.E.2d 709 (1960) (caddy injured "shagging" golf balls denied recovery on basis of assumption of risk).

2 Hietala v. Boston & Albany R.R., 295 Mass. 186, 190-191, 3 N.E.2d 377, 380 (1936).

3 Miner v. Connecticut River R.R., 153 Mass. 398, 26 N.E. 994 (1891).

4 Where the defendant by his negligence has placed the plaintiff or a third party in imminent peril, he cannot defend on the basis of assumption of risk when the plaintiff uses reasonable means under the circumstances to protect himself or where the plaintiff in a reasonable manner, goes to the rescue of the third person. Edgarton v. H. P. Welch Co., 321 Mass. 603, 74 N.E.2d 674 (1947).

plaintiff then, obviously there should be no recovery on that basis. If, on the other hand, the defendant has breached a duty to the plaintiff, the remaining question in determining whether liability exists should relate to the due care exercised by the plaintiff for his own safety. In other words, the question should not be whether the plaintiff voluntarily exposed himself to a known and appreciated risk but rather whether such exposure was, under the circumstances, a reasonable act.[5]

The lack of logic or justice inherent in the assumption of risk doctrine is compounded by the comparative negligence statute. Since the statute speaks in terms only of contributory negligence, it is quite possible that the statute will have no application if it is found that the plaintiff had assumed the risk. It would be absurd to hold that, if the plaintiff's assumption of risk was unreasonable, then the assumption of risk defense may be ignored and the comparative negligence statute applied to the unreasonable aspect of his conduct, whereas, if his assumption of risk was reasonable under the circumstances, then it will operate as a complete defense. Likewise, it would appear unjust to completely deny recovery to the plaintiff where his conduct involves an assumption of risk, whether reasonable or unreasonable, and allow a partial recovery to a plaintiff who has been guilty of contributory negligence. Either the assumption of risk defense should be abolished or the comparative negligence statute amended to handle this problem.[6]

§2.7. Benefits from collateral sources. Often an injured plaintiff will, as a result of his injuries, receive certain benefits from sources other than the defendant or the defendant's insurer. There are basically three types of benefits which a plaintiff may receive from such a collateral source: (1) a continuation of wages during the period of disability; (2) proceeds from health and accident insurance policies and (3) services rendered gratuitously. In most instances in Massachusetts, the defendant is not entitled to a reduction of damages because the plaintiff has received a collateral benefit.

[5] Assume, for example, that the plaintiff slips on a sheet of ice on the stairway of the defendant's store. This condition was known to the defendant. The plaintiff saw the ice and appreciated the danger involved in walking on it. It is, in my opinion, fallacious to claim that the storeowner breached no duty to the plaintiff once the plaintiff saw the ice. The main issue should be whether the plaintiff acted negligently in attempting to walk on the ice. This should depend upon his reason for going into the store. If he is entering the only drug store in town to purchase a drug for a sick child, he is probably acting reasonably. If he is going into the store to buy a candy bar, the result should be different.

[6] In a 1962 Wisconsin decision, McConville v. State Farm Mutual Automobile Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14, the Supreme Court of Wisconsin held that the guest in an automobile who stays in the automobile in the face of a known hazard is no longer subject to the defense of assumption of risk. If the guest's exposure of himself is unreasonable and constitutes a failure to exercise ordinary care for his own safety, his conduct is negligent, and is subject to the comparative negligence statute.

Wages received by the plaintiff during his disability, whether received as a matter of right under his employment contract or as a gratuity from his employer, are not deducted from the damages recoverable for impairment of earning capacity.[1] This result is based upon the rather tenuous distinction (at least as far as past damages are concerned) between recovery of wages as such and recovery for impairment of earning capacity. Since recovery in Massachusetts is for impairment of earning capacity and not for wages as such,[2] recovery may be had for impairment of earning capacity despite the fact that the plaintiff lost no wages.

With respect to receipt of proceeds from health and accident insurance policies, Massachusetts follows the rule of most states that the defendant is not entitled to benefit from the fact that the plaintiff has a health and accident insurance policy. Thus, despite the fact that it will result in a windfall to the plaintiff, the defendant is not entitled to have the proceeds received by the plaintiff from his insurance company deducted from the damages.[3]

While the cases are far from clear on the matter, they appear to indicate that the plaintiff may recover for services rendered in connection with his injury, if he could have been legally bound to pay for them.[4]

While none of the Massachusetts cases appears to emphasize the matter, one of the principal reasons given in other states for allowing a plaintiff to recover reimbursed expenses from the defendant is the punitive element of tort law — that it is preferable that the so-called innocent party obtain a windfall than the wrongdoer benefit from a collateral source. This rationale would no longer appear viable where the plaintiff recovers under a comparative negligence statute. It is the opinion of this writer that, for example, a plaintiff who has negligently contributed to his own injury should not recover medical expenses which were in fact paid by an insurance company; nor should he recover for impairment of earning capacity without diminution of wages received; nor should he recover the value of services which in fact were gratuitously rendered.

§2.8. Contribution among joint tort-feasors. Chapter 231B of the General Laws provides for contribution among joint tort-feasors. Section 2 of this Chapter specifically provides that, in determining the pro rata shares of the tort-feasors in the entire liability, the relative degrees of fault of the defendants shall not be considered. It is clear that the Massachusetts comparative negligence statute has no effect

§2.7. [1] Shea v. Rettie, 287 Mass. 454, 192 N.E. 44 (1934).
[2] Doherty v. Ruiz, 302 Mass. 145, 18 N.E.2d 542 (1939).
[3] Gray v. Boston Elevated Ry., 215 Mass. 143, 146, 102 N.E. 71, 72 (1913).
[4] See Daniels v. Celeste, 303 Mass. 148, 21 N.E.2d 1 (1939), distinguishing Copithorne v. Hardy, 173 Mass. 400, 53 N.E. 915 (1899). See, however, Sibley v. Nason, 196 Mass. 125, 81 N.E. 887 (1907), which appears to imply that a moral obligation would be sufficient.

on this provision. The comparative negligence statute compares degrees of negligence between the plaintiff and the defendant or defendants, not between the defendants as such.[1]

The adoption of the comparative negligence statute should eventually cause reconsideration of the pro rata concept in the contribution statute. Of course, any change in the contribution statute which would make the amounts of contribution dependent upon degrees of negligence should in no way affect the plaintiff's right to collect the full amount of the judgment from any one or more joint tort-feasors. It would merely affect the ultimate adjustment among the tort-feasors themselves.[2]

C. Conclusion

§2.9. Probable effects of the statute. It is not likely that the comparative negligence statute will substantially increase, in the aggregate, awards to injured plaintiffs. In some cases, it will merely legitimatize what juries have for many years been doing — compromising verdicts in a not too flagrant manner. In other instances, by eliminating the all or nothing approach, the comparative negligence statutes may actually reduce the amount of plaintiff awards. Further, the adoption of comparative negligence will certainly result in more cases being settled out of court.

Finally, apart from eliminating the complete defense effect of contributory negligence, the comparative negligence statute is not likely to affect other aspects of the law which have developed in the area of contributory negligence. One possible exception to this statement relates to the striking of the present G.L., c. 231, §85. Under the present Section 85, the plaintiff enjoys the presumption of due care, and the burden of proof on the issue of the plaintiff's contributory negligence rests with the defendant. Prior to the adoption of the prede-

§2.8. [1] Thus, for example, if, in an action against joint defendants the jury found the plaintiff free from contributory negligence, it would have no reason to determine the degrees of negligence of each defendant. If it found the plaintiff was guilty of contributory negligence, it would find the degree of negligence of each party to determine whether the negligence of the plaintiff was not as great as the negligence of the person against whom recovery was sought. See §2.5 *supra*.

[2] In the 1962 Wisconsin decision, Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105, the Supreme Court of Wisconsin took the occasion to re-examine the doctrine of contribution between joint tort-feasors and held that contribution should be proportionate to percentage of causal negligence. In Wisconsin, contribution was judicial in origin and could thus be changed judicially. Change in Massachusetts would require an act of the legislature.

In its holding in the Bielski decision the Court stated: "It is difficult to justify, either on a layman's sense of justice or on natural justice, why a joint tortfeasor who is 5% causally negligent should only recover 50% of the amount paid to the plaintiff from a co-tortfeasor who is 95% causally negligent, and conversely why the defendant who is found 5% causally negligent should be required to pay 50% of the loss by way of reimbursement to the co-tortfeasor who is 95% negligent." Id. at 6, 114 N.W.2d at 109.

cessor of the present Section 85,[1] the plaintiff had the burden of proof on the issue of his own due care.[2]

Chapter 761 of the Acts of 1969, which contains the comparative negligence provisions, strikes out the present Section 85. In so doing, some confusion may be created as to whether the plaintiff's presumption of due care still exists and whether the defendant still initially has the burden of proof on the issue of the plaintiff's contributory negligence. The likelihood is that the courts will hold that, while the new Section 85 says nothing about burden of proof on contributory negligence, the essence of a comparative negligence statute calls upon each of the parties to prove the other's negligence. This is probably the correct interpretation of the statute. On the other hand, it may reasonably be argued that, since the comparative negligence provisions only operate when the jury has found the plaintiff guilty of contributory negligence, they have no logical effect on the question of which party initially has the burden of proof on the issue of the plaintiff's own negligence or due care, and thus they do not fill the void on this issue, created by the striking of the present Section 85.

§2.9. [1] Stat. 1914, c. 553.
[2] Duggan v. Bay State Street Ry., 230 Mass. 370, 375, 119 N.E. 757, 758 (1918).